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No. 91-2032

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

TRANSOIL (JERSEY) LTD.,
v. *Petitioner,*

BELCHER OIL COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, Transoil (Jersey) Ltd. ("Transoil"), respectfully submits this Reply Brief in support of its petition for a writ of certiorari.

In our petition, we set forth three distinct reasons why this Court's attention is warranted in this case. Respondent, Belcher Oil Company ("Belcher"), fails to address any of them in a meaningful way. In response to our most fundamental point—that the court of appeals' refusal to allow Transoil to defend the judgment below was aberrational (Pet. 13-16)—Belcher ignores this Court's precedents and plainly misstates the law. Next, Belcher completely ignores our demonstration that the court of appeals' entry of judgment in favor of Respondent directly contravenes holdings of this Court (Pet. 21-22). And, in response to our demonstration that the decision below allowed Belcher to outflank Rule 51 of the

Federal Rules of Civil Procedure in a way that conflicts with holdings of this Court and of other courts of appeals (particularly the Ninth, Seventh, and Fourth Circuits) (Pet. 16-21), Belcher merely points to two cases, neither of which supports its assertion that there is no conflict.

Rather than actually address any of the legal issues raised in the petition, Respondent devotes its efforts to a discussion of whether the evidence was sufficient to support the jury's verdict—a verdict that was, of course, for *Petitioner* both on the question of liability for breach of contract and on damages! This case does not require the Court to reevaluate the evidence; the court of appeals' errors are errors of law, which can be—and should be—corrected.

1. *Respondent Ignores the Court of Appeals' Fundamental Error.*—There is no dispute in this Court that Transoil—plaintiff in the district court and appellee in the court of appeals—properly proved to the jury that Belcher breached its contract, as the jury found. *See* Pet. App. 4a-7a. There is no dispute that Transoil's theory of damages under U.C.C. § 2-711 supports the jury's damages verdict to the dollar. *See* Pet. 6-7 & n.8, 9-10 & n.12. And there is no dispute that the evidence adduced at trial supports recovery under that provision, which allows the buyer to "recover[] so much of the price as has been paid," U.C.C. § 2-711, less the proceeds of a commercially reasonable sale to mitigate damages. *See* Pet. 8-10.[1] Yet the court of appeals rendered a "take nothing" judgment on the theory that Rule 51 precluded Transoil—the appellee—from defending the judgment below because it did not request a jury instruction literally parroting the language of that statute. Pet. App. 10a. In doing so, the court of appeals flatly ignored a fundamental axiom of

[1] Thus, the jury's award of damages was the price of the oil that Transoil was made to pay when its letter of credit was called, less what the resale brought. *See* Pet. 4-5 & nn.4-5.

appellate practice—that an *appellee* may defend its judgment on any ground presented below.[2]

We have searched in vain for *any* prior case in which *any* court of appeals invoked Rule 51 (or its counterpart, Fed. R. Crim. P. 30) to preclude an appellee from defending a district court's judgment. Pet. 14. Apparently, Respondent's search found none either. The only cases it cites to support the court of appeals' aberrational holding in this respect (Br. in Opp. 4-5) are just like those cited by the court of appeals itself: they apply Rule 51 to *appellants* attacking jury charges they did not take exception to, not to appellees defending the judgment below (*see* Pet. 14-15).

The rule on its face applies only to appellants; it says that "[n]o party may *assign as error* the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict" (emphasis added). Transoil had no cause to make, and did not make, any "assign[ment] of error" with respect to the district court's verdict and judgment; they were entirely in Transoil's favor. But Transoil objected to the charge, which was given in lieu of its requested charges, and contended that its charge should have been given. *See* Transoil's Memorandum Regarding Jury Charge on Damages from Breach of Contract (filed April 1990). Although Transoil's objection would have sufficed even if it were an appellant, Rule 51 does not apply to an appellee. Respondent does not bother to acknowledge this Court's repeated admonition that an *appellee* may argue on appeal

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[2] *See* Pet. 13-15 (quoting and discussing *Blum* v. *Bacon*, 457 U.S. 132, 137 n.5 (1982); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979); *Massachusetts Mut. Life Ins. Co.* v. *Ludwig*, 426 U.S. 479, 480-81 (1976); *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970); *Jaffke* v. *Dunham*, 352 U.S. 280, 281 (1957); *United States* v. *American Ry. Express Co.*, 265 U.S. 425, 435 (1924)).

any properly preserved point in support of its judgment (*see* p. 3 n.2, *supra*).

Allowing the court of appeals' opinion to stand would work a detriment on the trial system, tending to encourage litigants to proffer inappropriately formalistic and legalistic jury instructions, rather than to endeavor to "make jurors understand" the case, *see Cape Cod Food Prods.* v. *National Cranberry Ass'n*, 119 F. Supp. 900, 907 (D. Mass. 1954). Respondent does not deny that the evidence and trial presentations support Transoil's recovery under U.C.C. § 2-711 (*see* Pet. 5-6 & n.6, 9-10 & n.12); instead, it falsely stated that "Transoil did not request submission of this theory to the jury." Br. in Opp. 5. The first of the jury instructions proposed by Transoil (and reproduced in the Appendix to our Petition at the top of page 21a) in fact *did* embrace the theory of recovery incorporated in U.C.C. § 2-711, though it did not slavishly follow § 2-711's words. The district judge appears to have been of the view that this proposed instruction was unnecessary because it was already covered in the general instruction he gave to the jury. Trial Transcript Vol. 9 at 6-7. But the critical point is simply that this theory was a fundamental part of Transoil's case—to say that it was not is to require magic language in a jury instruction at the risk of "waiving" one's entire case.

Respondent thus offers the Court no legitimate reason why this fundamental error should go uncorrected. The error is one of law. And it does not require anything more than what the Court did in *Massachusetts Mutual Life Insurance Co.* v. *Ludwig*, 426 U.S. 479, 480-81 (1976): a summary disposition vacating the court of appeals' opinion, thereby correcting a dangerous error in the process of appellate review.

2. *Respondent Ignores This Court's Holdings in* Weade *and* Iacurci, *Which Require a New Trial.*—Respondent stands completely mute in the face of our clear explana-

tion that the court of appeals' "take nothing" judgment directly contravenes this Court's holdings in *Weade* v. *Dichmann, Wright & Pugh, Inc.*, 337 U.S. 801, 808-09 (1949), and *Iacurci* v. *Lummus Co.*, 387 U.S. 86, 87-88 (1967). Indeed, Respondent does not even cite these cases. Thus, Respondent does not deny that *Weade* and *Iacurci* require reversal of the court of appeals' disposition of this case.

This Court has explained that where a plaintiff's jury verdict is reversed on appeal, "the court of appeals *may not* order judgment *n.o.v.* where . . . the record reveals a new trial issue which has not been resolved." *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 325 (1967) (emphasis added) (explaining the holding in *Weade*). Thus, in *Iacurci*, the Court followed *Weade* and summarily vacated a court of appeals' decision to render judgment n.o.v.—precisely because the jury "might not have passed" on alternative theories of liability. *Iacurci*, 387 U.S. at 87-88.

That is precisely this case: the court of appeals acknowledged a legitimate theory of recovery, yet blocked the plaintiff from pursuing it. Indeed, Respondent correctly conceded in the court of appeals that this theory was "available to Transoil under the UCC" (*see* Pet. 9-10 & n.12); it does not retract that concession here. But the court of appeals felt that the jury had not considered that theory (apparently disagreeing with the trial judge): "[w]e cannot say what findings the jury would have made on the plaintiff's claims under such a theory." Pet. App. 14a. *Weade* and *Iacurci* require a new trial under such circumstances. Yet neither the court of appeals nor the Respondent even acknowledges the existence of *Weade* or *Iacurci*. These two cases clearly and specifically require reversal.[3]

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[3] If nothing else, the Court should grant the petition, vacate the judgment of the court of appeals, and remand for further consideration in light of *Weade* and *Iacurci*.

3. *Respondent Attempts to End-Run Rule 51.*—The court of appeals allowed Belcher—the appellant—to attack the jury's damages verdict by using the guise of the "sufficiency" of the evidence. This was a not-so-subtle end-run around Rule 51. Transoil argued to the jury that it lost $8.40 per barrel due to Belcher's breach. The jury awarded Transoil the entire $8.40 per barrel, pursuant to a general damages instruction—not objected to by Belcher. Pet. App. 19a-20a. Belcher argued on appeal that the entire $8.40 per barrel loss "was a *consequence* of the general decline in oil prices," and that "consequential damages" were excluded by the contract. Brief of Appellant at 26 (emphasis in original; quoted at Pet. 10). The court of appeals agreed with Belcher that the market drop in the price of oil could not properly be included in Transoil's damages and concluded that this element of the jury's general damage verdict was the entire cause of the damages. Pet. App. 12a-13a.

But if Belcher's position was that this element of damages—the drop in market price—should have been excluded from consideration by the jury as "consequential," it was required to object to the general instruction (reproduced at Pet. App. 19a-20a) on this ground.[4] Having failed to do so, it should not have been permitted to complain on appeal that the jury *did* consider the drop in market price as an element of Transoil's damages. This Court, along with the Seventh and Fourth Circuits, has precluded just such sandbagging, holding that an appellant may not complain of a jury's inclusion of an element of damages under a general instruction unless the trial judge was requested to give an instruction excluding the element. *McDermott* v. *Severe*, 202 U.S. 600, 610 (1906); *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 675 (7th Cir. 1985), *cert. denied*, 475 U.S. 1129 (1986); *United States* v. *Board of Educ. of the County of Mineral*, 253 F.2d 760 (4th Cir. 1958).

[4] Such an objection would, of course, have been baseless given U.C.C. § 2-711.

Respondent utterly fails to acknowledge *McDermott*, which quite clearly prohibits a defendant from attacking a jury verdict on appeal by arguing that certain kinds of damages should not have been a part of the verdict, unless the defendant/appellant made a proper request for an instruction. And Respondent's only answer to the holdings to the same effect in the Fourth and Seventh Circuits is the citation of two cases that do not in any way diminish the Fifth Circuit's conflict with those courts.

Respondent points to a Second Circuit case that, like the Fifth Circuit's decision in this case, clearly conflicts with *McDermott*, *Will*, and *Board of Education*. In that case, *Getty Petroleum Corp.* v. *Bartco Petroleum Corp.*, 858 F.2d 103, 107-08 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1990), the Second Circuit considered a defendant's attack on an element of damages even though the defendant had not objected to the jury charge allowing the element to be included. The Second Circuit acknowledged that the procedural hurdle "would seem insurmountable" and reached the merits of appellant's contentions "despite the careful wording of Rule 51." 858 F.2d at 107. Indeed, the Second Circuit went so far as to allow the issue to be pressed on appeal, even though it concluded that no "plain error" had been committed, under a four factor test—a test that will presumably be pressed by future appellants in contravention of Rule 51. 858 F.2d at 108.[5] That the Second Circuit erred in this respect (in contravention of the plain language of the rule and in contrast to the approach of this Court and other circuits) does not mean that there is no conflict. It in fact supports the opposite conclusion: the courts of appeals are in disagreement over this issue and need

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[5] Most courts of appeals will allow *appellants* an exception to Rule 51's plain language only in cases of "plain error," though the Ninth Circuit will not even go that far. *See* Pet. 20-21 & n.15.

this Court to remind them that Rule 51 means what its words say.[6]

4. *Respondent Mischaracterizes This Case as Being About the Sufficiency of the Evidence.*—Finally, a word is necessary as to what this case is *not* about. It is *not* about the sufficiency of the evidence, and Respondent's contention to the contrary is a transparent attempt to obfuscate. The court of appeals precluded a plaintiff from defending its judgment on a legal theory conceded to have merit and conceded to have been "available" under the evidence and as to which it proffered an instruction, which was rejected. It did so even though it had no quarrel with the jury's verdict of liability. It did so by invoking a rule that had never before been held to have that effect. It compounded its error by entering judgment n.o.v. against the plaintiff while acknowledging that it did not know what findings a jury would have made, had plaintiff's legally and factually "available" damages theory been charged as plaintiff requested. And, in doing so, it allowed the appellant to end-run Rule 51. No sifting of the record is needed to correct this aberrational decision.

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[6] The other case cited by Respondent, which is from the Seventh Circuit (*Abel* v. *Miller*, 824 F.2d 1522 (7th Cir. 1987)), has nothing to do with attacking jury instructions—indirectly or otherwise.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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